NO. 43113-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MAXPHIL LAUE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-00494-3

BRIEF OF RESPONDENT

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DATED November 29, 2012, Port Orchard, WA
Original e-filed at the Court of Appeals; Copy to counsel listed at left.

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2. Whether, as the Supreme Court has held, the trial court properly required polygraph testing as a condition of Laue's community custody?

3. Whether the trial court's requirement that Laue receive CCO permission before accessing the internet or possessing a cell phone or computer was reasonably related to the circumstance of the crime that he made the five-year-old victim watch sexually explicit material before raping her?

4. Whether the sentencing condition relating to pornography must be stricken? [Concession of Error]

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Maxphil Laue was charged by amended information filed in Kitsap County Superior Court with two counts of rape of a child. CP 6. Both counts were alleged to have occurred between September 22, 2004 and September 21, 2006. CP 6-7. The trial court dismissed the second count. CP 35. A jury found him guilty of the remaining charge. CP 55.

B. FACTS

KGC was 12 years old at time of trial, having been born on September 22, 1999. RP 112. She was babysat at her grandmother's house by Kimberly Johnson, but did not recall how old she was at the time. RP 113-14. Laue and her KGC's little brother were also there when Johnson was babysitting. RP 118. Laue was Johnson's boyfriend. RP 119.

Johnson took a nap almost every day, even when Laue was not there. RP 133. When Johnson napped in the bedroom chair, Laue would rape KGC. RP 120. Laue would get her in the living room behind the junk pile and tell her to take her pants down. RP 120. Then he would lick her vagina. RP 120. Then he would tell her to do the same thing to him. RP 120. He would pull his pants down and have her lick his penis. RP 121. It would end when Johnson woke up. RP 121. Then KGC would return to the room with Johnson. RP 121. Before the actual contact, he would show her "videos of

people doing what you do to make a baby." RP 122.

KGC never told anyone about it at the time it was happening. RP 123. She never told Johnson about the rape. RP 138. She never went upstairs and told her grandmother about it. RP 142. She first told her mother about it about a year before trial. RP 123. They were watching a TV show where someone talked about being molested, and it made KGC remember everything that had happened, and she told her mother about it. RP 123. Nothing happened after that. RP 124.

Then she told her father, who called the police. RP 124. She also told Diane Sabo, the school counselor about it, and then they started looking for Laue. RP 124.

Kandice Sunnenberg, KGC's mother testified that Johnson babysat KGC and her two-year-old brother at Sunnenberg's parents' house in the spring of 2005, for about four months. RP 163. Johnson lived in the downstairs suite, which is where she babysat the kids. RP 166. Sunnenberg's husband would drop them off in the morning, and she would pick them up in the afternoon. RP 164. They would be there two to six hours a day, depending on his work schedule. RP 164.

Laue, KGC's grandmother, Ann Gregory, Laue, and occasionally, Johnson's daughter Briana would also be there. RP 164. Briana was only

there a few times a month. RP 166. Laue was there most days. RP 171. Gregory was sick and had essentially been bed-ridden for 20 years. RP 173.

Sometimes when Sunnenberg picked up the kids, Johnson would be sleeping. RP 165. Johnson stopped babysitting because she got sick. RP 165. She subsequently died, about six months later. RP 166.

KGC revealed the abuse to Sunnenberg in August 2009. RP 172. Sunnenberg asked KGC if she wanted to go into counseling, which KGC declined. RP 172. Sunnenberg assumed the statute of limitations had run, so she did not call the police at that time. RP 172. Subsequently, KGC went to see the school counselor. RP 173. The counselor was a mandatory reporter, but she gave Sunnenberg the option of reporting it herself, which she did. RP 173.

Sunnenberg never noticed any behavioral changes in KGC at the time. RP 173, 198. Nor did she have any indication at the time from KGC that anything was going on at Johnson's house that was inappropriate. RP 187. KGC did not say anything about Laue at the time. RP 199. Nor did she appear to be afraid of him. RP 200. Johnson had a reputation among people Sunnenberg knew as being trustworthy around children, and protective of them. RP 200-01. She would have expected that Johnson would have let her know if she had been aware that Laue was raping KGC. RP 201.

Sunnenberg's only contact with Laue since the babysitting was in 2007 or 2008, when her parents hired him to do some yard work and set up a pool at her house. RP 173. Sunnenberg did not observe any one-on-one conversations between Laue and KGC at that time. RP 174. She saw him one other time outside Best Buy, but KGC was not with her then. RP 174.

Ann Gregory, KGC's step-grandmother, testified that Laue lived in the basement suite before Johnson moved in. RP 206. When Johnson was babysitting KGC, Gregory would see KGC every day or every other day, when KGC came upstairs. RP 207. Gregory almost never went down, because the stairs were too difficult for her. RP 207.

Gregory did not note any changes in KGC's behavior at the time. RP 211. Johnson had a reputation of being trustworthy and protective of children. RP 212. She had no doubt that if Johnson had known that KGC was being assaulted, Johnson would have done something about it. RP 212.

The State also presented the testimony of the school counselor who caused the matter to be reported to the police. RP 213-17. Finally, the State presented a recording of a phone call Laue made from the jail before trial, in which he stated, "Some shit's come back from years ago haunting me now." RP 222-23, 239, 262.

Briana Johnson testified on Laue's behalf. She asserted that her

mother did not regularly take naps when KCG was there. RP 252. She also testified that KGC would run up to Laue when he walked in, and that KGC never demonstrated any fear of Laue. RP 253. Briana thought that KGC seemed happy and well adjusted; Briana never noticed any change in that. RP 254. She also opined that her mother would have done something if she was aware that Laue was doing anything to KGC. RP 255.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY EXCLUDED A ONE-PAGE MEDICAL EXAMINATION FORM ON RELEVANCE GROUNDS WHERE LAUE SOUGHT TO INTRODUCE IT ON THE THEORY THAT THE FIVE-YEAR-OLD VICTIM'S FAILURE TO COMPLAIN TO HER DOCTOR ABOUT SEXUAL ABUSE CAST DOUBT ON HER SUBSEQUENT CLAIM OF ABUSE, WHERE THERE WAS NO EVIDENCE THAT THE CLINIC EVER ASKED THE VICTIM, OR EVEN REGULARLY ASKED FIVE-YEAR-OLDS ABOUT ABUSE, AND WHERE THERE WAS NO EVIDENCE THAT THE ABUSE ALLEGED WOULD HAVE LEFT ANY MARK OR SCARRING THAT A DOCTOR WOULD HAVE DETECTED.

Laue first claims that the trial court erred in excluding proposed Exhibit 5, which consisted of a single-page examination form reflecting a well-child visit by the victim to her doctor around the time that the abuse occurred. He alleged that the document was relevant because it did not reflect any complaint by KGC about the abuse. The trial court did not abuse

its discretion in finding that because there was no evidence that five-year-old KGC was asked about any inappropriate touching at the time of the exam, the report was irrelevant.

The admission and exclusion of evidence are within the sound discretion of the trial court and, thus, are reviewed for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A decision to admit or exclude evidence, therefore, will be upheld absent an abuse of discretion, which may be found only when no reasonable person would have decided the same way. *Thomas*, 150 Wn.2d at 869. The trial court here acted within its discretion.

1. The trial court never ruled that the record did not fall within the business record hearsay exception.

Laue first argues that the trial court erred in finding that the record was not admissible as a business record "because the medical provider who conducted the exam and prepared the record was unavailable to testify." Brief of Appellant at 9. The trial court did no such thing. Rather, its ruling was that because the record was devoid of any details, and because the examining physician was unavailable, the document standing alone lacked relevance:

> First of all, the person who wrote this document, as we heard, is unavailable and is now deceased. The doctor who would be testifying or the medical professional who would be testifying to this document doesn't have any personal

> knowledge of the examination, does not know exactly what was said during the examination, and could only speak to general protocol but would not have any first-hand experience as to whether or not that protocol was followed on that particular date. *We don't know whether or not it was -- the questions were asked about good touch, bad touch, right or wrong touch, that type of question. So basically, what we are left with is a great deal of speculation about what might have happened, during the well-child examination.*

1RP 45-46. The first part of Laue's claim is thus a strawman argument and should be rejected.

2. Because the document did not disclose whether the doctor inquired with KGC about inappropriate touching, and because there was no allegation that Laue touched her in a way that would cause physical injury, the one-page examination form was not relevant to any issue at trial.

Evidence offered to impeach is relevant only if (1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action. *State v. Allen S.*, 98 Wn. App. 452, 459-460, 989 P.2d 1222 (1999). The State concedes that KGC's credibility is a fact of consequence to the case.

Even if the person being attacked is one who can be impeached, however, the particular evidence being offered must still be (1) relevant to impeach, and (2) either non-hearsay or within a hearsay exemption or exception. *Allen S.*, 98 Wn. App. at 466. The State, as noted above, does not claim that record was inadmissible as hearsay. Nevertheless, the evidence was properly excluded as irrelevant.

ER 401 defines relevancy:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Proposed impeachment evidence is not relevant where its probative value relies on speculation. Thus in *State v. Weaville*, 162 Wn. App. 801, ¶ 40, 256 P.3d 426 (2011), this Court rejected a claim that the trial court improperly excluded impeachment evidence. There, the defendant claimed that the trial court should have admitted evidence that the victim's underwear contained the semen of a person other than the defendants. The defendant argued that the victim provided the police with underwear containing semen, even though she knew that it did not contain either of the defendants' semen, in order to bolster her claims of rape. However, the defense was unable to demonstrate that the victim had not been wearing the underwear that she provided to the police officers. There was this no actual evidence that she attempted to present false evidence, and the proposed evidence was properly excluded as irrelevant.

Similarly, here there was no evidence that KGC, who was five years old at the time, was asked any questions about inappropriate touching at the well-child examination. There was no evidence that such questions were regularly asked at the clinic in question. There was no evidence that anything

Laue did to KGC (she testified that he licked her vagina) would have left a mark that would have been noted by a medical professional. In short, it would be the grossest speculation to conclude that KGC was lying about the abuse because there is no mention of sexual abuse in the one-page form that Laue sought to introduce.

3. Because the evidence was not relevant, Laue's constitutional right to present a defense was not impaired.

Finally, with regard to the constitutional aspect of Laue's claim, the defendant's right to present evidence in support of his case is limited by the requirement that the proffered evidence not be "otherwise inadmissible." *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). This is because "a criminal defendant has no constitutional right to have irrelevant evidence admitted." *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Since the evidence Laue proffered was not relevant, the trial court's ruling did not violate his constitutional right to present a defense.

4. Because Laue elicited testimony from every witness that KGC did not complain of the assaults at the time they occurred, that she exhibited no behavioral changes nor inappropriate sexual acting out at that time, even if the report were relevant it would have been cumulative and as such any error would be harmless.

Both evidentiary and constitutional error relating to the right to present a defense may be harmless. The error alleged here, if error at all,

would be harmless under either test for harmlessness. "[E]ven a constitutional error does not require reversal if, beyond a reasonable doubt, the untainted evidence is so overwhelming that a reasonable jury would have reached the same result in the absence of their error." *State v. Saunders*, 120 Wn. App. 800, 813, 86 P.3d 232 (2004) (*citing State v. Guloy*, 104 Wn.2d 412, 425–26, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986)).

Laue elicited testimony from every witness that KGC did not complain of the assaults at the time they occurred, and that she exhibited no behavioral changes nor inappropriate sexual acting out at that time that the rapes were alleged to have occurred. As such, the admission of the vague medical form would have been cumulative at best, and indeed, far weaker than the testimony permitted. As such any error would be harmless. *See State v. Hayes*, 165 Wn. App. 507, 521, 265 P.3d 982 (2011) (Defendant "was not denied his right to present a defense because he was allowed to introduce other evidence impeaching [the victim's] credibility"). This claim should be rejected.

B. THE TRIAL COURT PROPERLY REQUIRED POLYGRAPH TESTING AS A CONDITION OF LAUE'S COMMUNITY CUSTODY.

Laue next claims that the trial court was without authority to require Laue to submit to polygraph testing. This claim has already been rejected by

the Washington Supreme Court.

Laue relies on *In re Hawkins*, 169 Wn.2d 796, 238 P.3d 1175 (2010), for his argument, but that case is inapposite. In *Hawkins*, a sexually violent predator proceeding, the State essentially requested a polygraph examination as a matter of pre-trial discovery. *See Hawkins*, 169 Wn.2d at ¶ 6 n.1 (rejecting Court of Appeals reliance on CR 26). The Supreme Court rejected the State's request for the polygraph as a matter of statutory construction. *See Hawkins*, 169 Wn.2d at ¶ 8 ("We are called upon to determine what the legislature intended with respect to polygraph examinations when it authorized 'an evaluation as to whether the person is a sexually violent predator.'"). After examining the relevant statutory language in RCW ch. 71.09, the Supreme Court concluded that the Legislature did not intend to permit polygraphs to be ordered in the context presented there. *Hawkins*, 169 Wn.2d at ¶¶ 9-14.

In *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998), *abrogated on other grounds*, *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010), however, the Supreme Court examined whether the Legislature intended to allow submission to polygraph testing as a condition of a sex offender's sentence. The Court concluded that it did:

> A trial court has authority to impose monitoring conditions such as polygraph testing. Although the results of polygraph tests are generally not admissible in a trial, this

> Court has acknowledged their validity as an investigative tool. Allowing trial courts to impose polygraph testing on sex offenders is consistent with the guidelines provided in WAC 246-930-310(7)(b) for therapists working with sex offenders:
>
> > The use of the polygraph examination may enhance the assessment, treatment and *monitoring* processes by encouraging disclosure of information relevant and necessary to understanding the extent of present risk and *compliance with treatment and court requirements. When obtained, the polygraph data achieved through periodic examinations is an important asset in monitoring the sex offender client in the community.*

Riles, 135 Wn.2d at 342 (emphasis the Court's, footnotes omitted). The Court went on to note that in 1997, the Legislature had amended RCW 9.94A.030 and 9.94A.120 to authorize trial courts to order affirmative acts necessary to monitor compliance with sentencing conditions, and making mandatory the affirmative acts necessary to monitor compliance with orders of the court. *Riles*, 135 Wn.2d at 342-43. The Court concluded that these amendments were meant to ratify the imposition of polygraphy conditions:

> These amendments suggest the Legislature intended to confirm the practice of allowing testing, such as polygraphs, for monitoring compliance with sentencing conditions. Where there has been doubt or ambiguity surrounding a statute, amendment by the Legislature is interpreted as some indication of legislative intent to clarify, rather than to change, existing law. A subsequent amendment can be further indication of the statute's original meaning where the original enactment was "ambiguous to the point that it generated dispute as to what the Legislature intended." One can conclude from these amendments that the Legislature intended to clarify and interpret the statute to resolve any

dispute concerning its actual meaning

Riles, 135 Wn.2d at 343 (footnotes omitted) (*quoting Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 150-51, 736 P.2d 265 (1987)).

Although the SRA has been modified many times since *Riles* was decided, the relevant provisions still contain the language on which the holding in *Riles* relied. For example, RCW 9.94A.030(10) still provides:

> "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. *However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.*

(Emphasis added).[1] Likewise, RCW 9.94A.712 (2006) provided:[2]

> (5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.
>
> (6)(a)(i) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5).

RCW 9.94A.712(6)(a)(i) (2006) further permitted the court to impose

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[1] The language was identical at the time of Laue's offense. RCW 9.94A.030(12) (2004); RCW 9.94A.030(13) (2005); RCW 9.94A.030(13) (2006).

[2] RCW 9.94A.712 (5) & (6)(a)(i) (2005) and RCW 9.94A.7125) & (6)(a) (2004) contained

affirmative conditions as part of community custody:[3]

> The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions.

Because the condition was contemplated by the Legislature, *Riles*, not *Hawkins* controls.

> Laue confines his discussion of *Riles* to a footnote:
>
> In *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998), the Supreme Court held that polygraphs could be ordered as a sentencing condition. It reasoned that polygraphs have been recognized as a useful investigative tool, and an amendment to the sentencing statute authorizing the court to order affirmative acts to monitor compliance suggested the legislature intended to confirm the use of testing such as polygraphs. *Riles*, 135 Wn.2d at 342-43. Although the Court in *Hawkins* did not address *Riles*, its holding that compelled polygraphs are permitted only when specifically authorized by statute appears to overturn *Riles*.

Brief of Appellant at 13, n.3. Notably *Riles* is not referenced in *Hawkins* at all. He fails to explain why this Court should presume *Riles* was overruled *sub silentio* by a case that was explicitly about the statutory construction of an entirely different statute in an entirely different context. This however, is his burden, which he has not met. This claim should be rejected.

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identical language.

[3] RCW 9.94A.712(6)(a)(i) (2005) and RCW 9.94A.712(6)(a) (2004) contained identical language.

C. THE TRIAL COURT'S REQUIREMENT THAT LAUE RECEIVE CCO PERMISSION BEFORE ACCESSING THE INTERNET OR POSSESSING A CELL PHONE OR COMPUTER WAS REASONABLY RELATED TO THE CIRCUMSTANCE OF THE CRIME THAT HE MADE THE FIVE-YEAR-OLD VICTIM WATCH SEXUALLY EXPLICIT MATERIAL BEFORE RAPING HER.

Laue next claims that the trial court's order prohibiting Laue from owning or accessing a computer or a cell phone, or accessing the internet without prior approval from his CCO is invalid under former RCW 9.94A.700 because the conditions are not crime related.[4] This claim is without merit.

As noted in the previous part of this brief, the term "crime related prohibition" is defined in RCW 9.94A.030. Under that section, no causal link need be established between the prohibition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. *State v. Llamas–Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). Sentencing conditions, including crime-related prohibitions, are reviewed for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 36–37, 846 P.2d 1365 (1993).

[4] Laue cites to RCW 9.94A.700(5)(e) (2003). The operative versions of the SRA were actually from 2004-2006. However, the citation and language remain the same. This provision is now codified, in materially unchanged form at RCW 9.94B.050(5)(e).

This case is thus distinguishable from *State v. O'Cain*, 144 Wn. App. 772, 773, 184 P.3d 1262 (2008), on which Laue relies. In *O'Cain*, there was no use of sexually explicit materials as part of the crime. The victim was shoved into some bushes and forcibly raped by the defendant. Here, the victim directly testified that she was shown sexually explicit videos before Laue raped her. It is a matter of common knowledge that sexually explicit material is abundant on the internet. It is also common knowledge that the internet is easily accessed from computers and from "smart" phones.

It was not unreasonable for the trial court to therefore require to Laue to get prior authorization before obtaining these devices or accessing the internet. The CCO could then take steps to ensure that Laue was not using these devices and the internet for improper purposes. Since the condition relates to the circumstances of the crime, was not an abuse of discretion.

Further, as also noted in the previous part of this brief, former RCW 9.94A.712(6) also provided that the trial court could require Laue to "perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." This provision was not an outright prohibition on internet, mobile phone or computer usage. It merely required Laue to take the affirmative step of obtaining prior authorization before acquiring the devices or accessing the internet. This claim should be rejected.

D. THE SENTENCING CONDITION RELATING TO PORNOGRAPHY MUST BE STRICKEN [CONCESSION OF ERROR].

Laue, citing *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008), argues that the provision in his judgment and sentence requiring that he "possess no pornography as defined by CCO or treatment official" is unconstitutionally vague. Under *Bahl*, sentencing conditions such as those involved here are subject to a facial validity analysis. *Bahl*, 164 Wn.2d at ¶ 21 ("The vagueness challenges in this case involve legal questions."). Moreover, *Bahl* holds that a similar condition that prohibited Bahl from "'possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer'" was unconstitutionally vague. *Bahl*, 164 Wn.2d at ¶¶ 28, 37 (alterations the Court's). The *Bahl* court therefore ordered that the condition be stricken. In view of the foregoing, the State must concede that provision contained in Laue's judgment and sentence is unconstitutional because of the term "pornographic." Laue is therefore entitled to have the term stricken from his judgment. On remand the trial court should be permitted to amend the condition so that it survives constitutional scrutiny. *See Bahl*, 164 Wn.2d at ¶¶ 38-43 (holding that the term "sexually explicit" is not vague).

IV. CONCLUSION

For the foregoing reasons, Laue's conviction should be affirmed, and

the matter remanded for correction of the judgment and sentence striking the term "pornography."

DATED November 29, 2012.

Respectfully submitted,

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